NO. 44322-8-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

CHRISTOPHER N. MCDONALD,

Appellant.

BRIEF OF RESPONDENT

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1. In a prosecution for Tampering with a Witness, is it reversible error for the trial court to instruct the jury only on uncharged alternatives?

2. Did the trial court err in including six convictions for Violation of a Domestic Violence No-Contact Order when calculating the Defendant's offender score of Tampering with a Witness?

II. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Yes. The trial court erred in instructing the jury only on uncharged alternatives. Therefore, the conviction for Tampering with a Witness should be reversed and remanded for a new trial.

2. No. The six convictions for Violation of a Domestic Violence No-Contact Order were properly included in the Defendant's offender score.

III. STATEMENT OF THE CASE

The State agrees, for the most part, with the factual and procedural history as set forth by the Appellant. Where appropriate, the State's brief will point to specific facts in the record regarding the issues before the Court.

IV. ARGUMENTS

1. THE INSTRUCTIONAL ERROR WAS NOT HARMLESS; THUS, THE CONVICTION FOR TAMPERING WITH A WITNESS SHOULD BE REVERSED AND REMANDED FOR A NEW TRIAL.

"Jury instructions are sufficient if they are supported by substantial evidence, allow the parties to argue their theories of the case, and when

read as a whole properly inform the jury of the applicable law." *State v. Clausing*, 147 Wn.2d 620, 626, 56 P.3d 550 (2002) (*citing State v. Riley*, 137 Wn.2d 904, 908 n.1, 909, 976 P.2d 624 (1999)). "The constitution requires the jury be instructed on all essential elements of the crime charged." *State v. Chino*, 117 Wn. App. 531, 538, 72 P.3d 256 (2003). The instructions given to the jury are generally limited to the offense charged in the information. *State v. Foster*, 91 Wn.2d 466, 471, 589 P.2d 789 (1979).

In *Chino*, the defendant was charged with one of the alternative means of committing the crime of Intimidating a Witness, specifically subsection (d). *Chino*, 117 Wn. App. at 540. At trial, the jury was instructed on an uncharged alternative means of committing Intimidating a Witness, specifically subsection (c). *Id.* The defendant was convicted.

On appeal, the defendant challenged the inclusion of the uncharged alternative. *Id.* Division Three of the Court of Appeals held that the trial court committed error by instruction the jury on uncharged alternative means. *Id.* "Because the instructional error favored the prevailing party, it is presumed prejudicial unless it affirmatively appears the error was harmless." *Id.* (*citing State v. Bray*, 52 Wn. App. 30, 34-35, 756 P.2d 1332 (1988)). The court concluded that when reading the instructions as a whole, it "remains possible that the jury convicted Mr. Chino on the basis

of the uncharged alternative." *Id.* at 540-41. The court reversed the conviction and remanded the case for a new trial. *Id.* at 541.

Here, in light of *Chino*, the State concedes the issue. The jury was instructed on an uncharged alternative. In review of the record, both the State's and Appellant's argument to the jury was limited to evidence in support of the uncharged alternative. Furthermore, the charge alternative is not defined within the jury instructions. Therefore, it is the State's position that the Appellant's conviction for Tampering with a Witness should be reversed and remanded for a new trial.

2. FOR PURPOSES OF OFFENDER SCORE CALCULATION, VIOLATIONS OF A DOMESTIC VIOLENCE NO-CONTACT ORDER ARE PROPERLY INCLUDED IN AN OFFENDER SCORE FOR A FELONY DOMESTIC VIOLENCE CONVICTION UNDER RCW 9.94A.525(21)(c) AND RCW 9.94A.030(20).

Despite the fact that the State has conceded the Tampering with a Witness issue, it is necessary to address the Appellant's second issue. This Court can address issues likely to arise again on retrial. *See State v. Gregory*, 158 Wn.2d 759, 800, 147 P.3d 1201 (2006); *State v. Ra*, 144 Wn. App. 688, 702, 175 P.3d 688 (Div. 2, 2008). The Appellant has essentially argued that even if the Appellant had been convicted of a felony domestic violence offense, his six convictions for Violation of a

Domestic Violence No-Contact Order could not be included in his offender score. This argument is illogical and must fail.

a. Applicable Statutes

i. RCW 10.99.020

Under RCW 10.99.020(5), domestic violence includes but is not limited to any of the following crimes when committed by one family or household member against another:

> (a) Assault in the first degree;
> (b) Assault in the second degree;
> (c) Assault in the third degree;
> (d) Assault in the fourth degree;
> (e) Drive-by shooting;
> (f) Reckless endangerment;
> (g) Coercion;
> (h) Burglary in the first degree;
> (i) Burglary in the second degree;
> (j) Criminal trespass in the first degree;
> (k) Criminal trespass in the second degree;
> (l) Malicious mischief in the first degree;
> (m) Malicious mischief in the second degree;
> (n) Malicious mischief in the third degree;
> (o) Kidnapping in the first degree;
> (p) Kidnapping in the second degree;
> (q) Unlawful imprisonment;
> (r) *Violation of the provisions of a restraining order, no-contact order, or protection order restraining or enjoining the person or restraining the person from going onto the grounds of or entering a residence, workplace, school, or day care, or prohibiting the person from knowingly coming within, or knowingly remaining within, a specified*

distance of a location;
(s) Rape in the first degree;
(t) Rape in the second degree;
(u) Residential burglary;
(v) Stalking;
(w) And Interference with reporting of domestic violence.

RCW 10.99.020(5) (*emphasis* added).

The definition for what constitutes a "family or household member" is found in RCW 10.99.020(3). Read literally, RCW 10.99.020(5) states that domestic violence includes 23 listed crimes so long as the alleged victim is a family or household member, and may also include other crimes so long as the alleged victim is a family or household member.

ii. RCW 26.50.010

The definition for domestic violence under RCW 26.50.010 specifically requires physical harm, bodily injury, assault, or the fear of the same, or stalking, or sexual assault and the victim must be family or household member. Domestic violence is defined as:

> (a) Physical harm, bodily injury, assault, or the infliction of fear of imminent physical harm, bodily injury or assault, between family or household members; (b) sexual assault of one family or household member by another; or (d) stalking as defined in RCW 9A.46.110 of one family or household member by another family or household member.

RCW 26.50.010(1).

iii. The new scoring framework for repetitive domestic violence felons in RCW 9.94A.525(21).

RCW 9.94A.525(21) reads as follows:

> If the present conviction is for a felony domestic violence offense where domestic violence as defined in RCW 9.94A.030 was plead and proven, count priors as in subsections (7) through (20) of this section; however, count points as follows:
>
> (a) Count two points for each adult prior conviction where domestic violence as defined in RCW 9.94A.030 was plead and proven after August 1, 2011, for the following offenses: A violation of a no-contact order that is a felony offense, a violation of a protection order that is a felony offense, a felony domestic violence harassment offense, a felony domestic violence stalking offense, a domestic violence Burglary 1 offense, a domestic violence Kidnapping 1 offense, a domestic violence Kidnapping 2 offense, a domestic violence unlawful imprisonment offense, a domestic violence Robbery 1 offense, a domestic violence Robbery 2 offense, a domestic violence Assault 1 offense, a domestic violence Assault 2 offense, a domestic violence Assault 3 offense, a domestic violence Arson 1 offense, or a domestic violence Arson 2 offense;
>
> (b) Count one point for each second and subsequent juvenile conviction where domestic violence as defined in RCW

> 9.94A.030 was plead and proven after August 1, 2011, for the offenses listed in (a) of this subsection; and
>
> (c) Count one point for each adult prior conviction for a repetitive domestic violence offense as defined in RCW 9.94A.030, where domestic violence as defined in RCW 9.94A.030, was plead and proven after August 1, 2011.

This provision applies to felony domestic crimes committed after August 1, 2011. As the Appellant's crime was committed after this date, he is subject to this scoring provision. The Appellant's argument essentially rests upon the reference to the definition of domestic violence found in RCW 9.94A.030(20).

b. RCW 9.94A.030(20) does not require the Court to make a finding that the conduct meets the definition of domestic violence in both RCW 10.99.020 and 26.50.010.

i. The basic rules of statutory construction

The first and greatest principle of statutory construction is that the legislature means what it says. In other words, we look to the plain language of the statute before going to other statutory construction principles. "If the statute is clear on its face, its meaning will be procured from the plain language of the statute." *State v. Beaver*, 148 Wn.2d 338, 344-45, 60 P.3d 586 (2002).

> Statutory construction begins by reading the text of the statute or statutes involved. If the language is unambiguous, a reviewing court is to rely solely on the statutory language . . . Legislative history, principles of statutory construction, and relevant case law may provide guidance in construing the meaning of an ambiguous statute.

State v. Roggenkamp, 153 Wn.2d 614, 621, 106 P.3d 196 (2005). A Court interpreting a statute is "not obliged to discern any ambiguity by imagining a variety of alternative interpretations." *In re Washington*, 125 Wn. App. 506, 509, 106 P.3d 763 (2004). If a penal statute is ambiguous, it must be interpreted strictly against the state and liberally in favor of the accused.

Under the rules of construction, "statutes should not be interpreted so as to render any portion meaningless, superfluous or questionable." *Wright v Engum*, 124 Wn.2d 343, 352, 878 P.2d 1198 (1994); *see also Addleman v. Board of Prison Terms & Paroles*, 107 Wn.2d 503, 510, 730 P.2d 1327 (1986). The theory of statutory construction called *noscitur a scoiis* provides that a word should not be read in isolation but in context with those it is associated with. *Roggenkamp*, 153 Wn.2d at 623. Under rules of statutory construction, provisions of a statute should be read together with other provisions in order to determine the legislative intent underlying the statutory scheme. *State v. Chapman*, 140 Wn.2d 436, 448,

998 P.2d 282 (2000). "If alternative interpretations are possible, the one that best advances the overall legislative purpose should be adopted..." *Roy v. City of Everett*, 118 Wn.2d 352, 357, 823 P.2d 1084 (1992).

The Appellant's argument would have the Court conclude that the definition of domestic violence contained in RCW 26.50.010 should be adopted to RCW 10.99.020. The definition for domestic violence that is contained in RCW 26 is not applicable to RCW 10.99 because RCW 10.99 already contains a definition for domestic violence. This definition is decidedly different than the definition in RCW 26. RCW 26.50.010 makes clear that its definition of domestic violence applies only to Chapter 26: "As used *in this chapter*, the following terms shall have the meanings given them: (1) "Domestic violence" means..." RCW 26.50.010(1)(emphasis added).

ii. The meaning of "and"

RCW 9.94A.030(20) provides that "(20) "Domestic violence" has the same meaning as defined in RCW 10.99.020 and 26.50.010." Under the Appellant's logic, this statute's reference to two different statutory definitions requires that for an act to qualify as "domestic violence," it must meet some hybrid definition created by combining the two definitions found in these statutes. This reading of the statute is premised on an overly narrow understanding of the term "and."

A plain reading of the statutory language is that RCW 9.94A.030 means simply that "domestic violence," for pleading and proving purposes, is defined in the same way that it is in RCW 10.99.020. Furthermore, RCW 9.94A.030 also means that for pleading and proving purposes, the definition in RCW 26.50.110 is sufficient.

The Appellant argues that the legislature's use of the word "and" in RCW 9.94A.030(20) requires that the State meet both definitions of domestic violence in 10.99.020 AND 26.50.010. The flaw in this argument is that Washington Courts have routinely recognized that the word "and" is not limited to this type of narrow definition. Adopting this argument would lead to a litany of absurdities and would also be inconsistent with recent cases from the Washington Supreme Court and the Court of Appeals.

For instance, in *Mount Spokane Skiing Corp. v. Spokane County,* 86 Wn. App. 165, 936 P.2d 1148 (1997), the Court addressed a statute that said a government entity was authorized to:

> (4) Create public corporations, commissions, and authorities to: Administer and execute federal grants or programs; receive and administer private funds, goods or services for any lawful public purpose; AND perform any lawful public purpose or public function.

Id. at 172-73 (emphasis added). The plaintiff argued that a public authority was improperly created because it failed to meet all requirements of RCW 35.21.730(4). Specifically, the plaintiff argued that because the word "and" connects the three listed functions of a public corporation, all three functions must be undertaken by the municipal corporation.

The Court of Appeals, however, rejected this argument, holding that "The disjunctive "or" and conjunctive "and" may be interpreted as substitutes." *Id.* at 174 (*citing State v. Tiffany*, 44 Wn. 602, 604, 87 P. 932 (1906)). The court went on to note that:

> It is clear from a plain reading of the statute that the powers listed in paragraph (4) are the possible functions a public corporation may undertake. *Nowhere does it appear from the statutory language that the corporation must undertake each and every function in order to be valid and legal. Nor does such an interpretation comport with common sense.* Based upon the plain language and intent of the statute, a public corporation may undertake one or more of the functions listed in paragraph (4).

Id. at 174.

The Washington Supreme Court reached the same result in a similar case, *CLEAN v. City of Spokane*, 133 Wn.2d 455, P.2d 1169 (1997). In *CLEAN*, the Court looked at RCW 35.21.730, which allows cities to create public corporations "to improve the administration of

authorized federal grants or programs, to improve governmental efficiency and services, or to improve the general living conditions in the urban areas..." RCW 35.21.370. The appellants argued that a Public Development Authority (hereinafter, "PDA") violated RCW 35.21.730(4), which sets forth three potential functions for a PDA: to administer federal grants, receive private assistance, AND perform any lawful public purpose. *CLEAN*, 133 Wn.2d at 473. Appellants argued that the Spokane PDA was violating this portion of the law because, worded conjunctively, the statute required a PDA to perform *all three of these functions*. The Supreme Court, however, held that:

> This argument is meritless. The plain language of the statute states that a city 'may' create a public corporation for these varied purposes. Although it is true the word "and" appears in the statute, all three statutory elements need not be present for a PDA to be acting lawfully.

Id. at 473-74.

In addition, in *Bullseye Distributing LLC v. State Gambling Com'n*, 127 Wn. App. 231, 110 P.3d 1162 (2005), Division Two of the Court of Appeals examined RCW 9.46.0241, which defined a "gambling device" as:

> (1) Any device or mechanism the operation of which a right to money, credits, deposits, or other things of value may be

> created, in return for a consideration, as the result of the operation of an element of chance, including, but not limited to slot machines, video pull-tabs, video poker, and other electronic games of chance;
> (2) Any device or mechanism which, when operated for a consideration, does not return the same value or thing of value for the same consideration upon each operation thereof;
> (3) Any device, mechanism, furniture, fixture, construction or installation designed primarily for use in connection with professional gambling; AND
> (4) Any subassembly or essentially part designed or intended for use in connection with any such device, mechanism, furniture, fixture, construction or installation.

In *Bullseye*, the defendant argued that RCW 9.46.0241 contains four elements that must all be met for a machine to qualify as a gambling device. Division Two, however, disagreed and held that "Although the statute is not written in the disjunctive, we hold that it contains four separate definitions of 'gambling device.'" *Bullseye*, 127 Wn. App. at 238-39. In addition, the Court stated "We find RCW 9.46.0241 unambiguous in defining four separate devices, any one of which is a gambling device." *Id.* at 240.

The Washington Supreme Court's analysis in *CLEAN* clearly applies to the present case. The Appellant's argues that the word "and" in RCW 9.94A.030(20) requires that a crime must meet both definitions of

domestic violence in RCW 10.99.020 and 26.50.010. As the Supreme Court found in *CLEAN*, this argument is meritless. Rather, as in *CLEAN* and *Mount Spokane*, the legislature's use of the word "and" simply means that in order to qualify, the crime must meet either the definition in 10.99.020 or the definition in 26.50.010. Either is sufficient.

In each of these three cases, the appellate courts addressed statutes that followed the same basic formula found in the present case. The formula, in essence, could be summarized as follows:

A can be defined as B, C, and D.

In each case, one party claimed that this meant in order for something to qualify as "A" it had to meet the definitions of "B", "C", *and* "D." The courts, however, disagreed and said that they statute simply meant that something that qualified as "B" meets the definition of "A" *and* that something that qualified as "C" meets the definition of "A" *and* that something that qualified as "D" meets the definition of "A."

In short, the plain language of RCW 9.94A.030(20) simply means that the phrase "domestic violence" has the same meaning that it has in 10.99.020. In addition, the phrase "domestic violence" can also have the same meaning as it has in 26.50.010. Both definitions are independently sufficient, and a crime that qualifies under either is to be considered a crime of domestic violence under RCW 9.94A.030(20). As in the

Bullseye case, this Court should find RCW 9.94A.030(20) unambiguous in defining two separate definitions of domestic violence, either of which is sufficient to qualify as domestic violence under 9.94A.030(20).

c. RCW 9.94A.030(20) would not be invalid simply because it contained superfluous language

The Appellant may counter the State's position by arguing that if the Court accepts the State's interpretation, then the statute would appear to contain some superfluous language. This argument means that it was technically unnecessary for the legislature to include any reference to 26.50.010 because crimes that would qualify under 26.50.010 would also qualify under 10.99.020. This argument also must fail.

As argued above, the definition of domestic violence contained in 26.50.010 explicitly states that it only applies to Chapter 26. It was necessary for the legislature to include both definitions of "domestic violence" because the legislature obviously intended to include offenses charged under a definition contained within 10.99.020 and offenses charged under a definition contained within 26.50.010. If the legislature only used the definition of domestic violence contained in 26.50.010 when it drafted 9.94A.030(20), then an argument could, and probably would be, made that offenses charged under 10.99.020 are not included in the new

sentencing scheme because "domestic violence" as defined in 26.50.010 only applies to offenses related to Chapter 26.

If this court finds that crimes that would qualify under 26.50.010 would also qualify under 10.99.020, then it would appear that RCW 9.94A.030(2) contains superfluous language. The inclusion of one essentially superfluous citation, however, does not render the statute absurd nor does it lead to other absurdities in the broader statutory scheme. Assuming that this court agrees that crimes that would qualify under 26.50.010 would also qualify under 10.99.020, then the legislature's only error was that it was being overly cautious and specifically listed RCW 26.50.010 when, in reality, it did not technically need to do so. In the grand scheme of things, the legislature's error in being overly inclusive is hardly the greatest example of sloppy statute drafting. Rather it is a minor inclusion of technically superfluous language.

The Appellant's position would lead to preposterous results. First, under the new laws, RCW 9.94A.030(41) includes a phrase "repetitive domestic violence offense," which is defined as:

> (a)(i) Domestic violence assault that is not a felony offense under RCW 9A.36.041;
>
> (ii) Domestic violence violation of a no-contact order under chapter 10.99 RCW that is not a felony offense;

> (iii) Domestic violence violation of a protection order under chapter 26.09, 26.10, 26.26, or 26.50 RCW that is not a felony offense;
>
> (iv) Domestic violence harassment offense under RCW 9A.46.020 that is not a felony offense; or
>
> (v) Domestic violence stalking offense under RCW 9A.46.110 that is not a felony offense; or
>
> (b) Any federal, out-of-state, tribal court, military, county, or municipal conviction for an offense that under the laws of this statue would be classified as a repetitive domestic violence offense under (a) of this subsection.

Under this interpretation, several sections of this statute would be rendered absurd and meaningless.

The Appellant's proposed reading of "domestic violence", requires that the violation of a no-contact order would have to be both NOT a felony, yet still meet the definition of domestic violence found in 26.50.010. Any violation of court order that includes assault or harm, etc., is by definition a felony because any violation of a no-contact order that includes an "assault" is *by definition* a felony. RCW 25.50.110(4). Furthermore, the term "assault" includes "harmful" contact or any act which creates imminent "fear of bodily injury." In short, it strains credibility to believe that it is even possible to have a violation of a no-

contact order that is both not a felony, yet includes an assault, since by definition any violation that includes an assault is a felony. Thus, under Appellant's interpretation RCW 9.94A.030(41)(a)(ii) would be meaningless. Under the State's reading of "domestic violence", however, the above statute makes perfect sense, as any violation of a no-contact order committed against a family or household member could qualify as a non-felony as long as there was no assault involved.

The State fully intends on retrying the Appellant for Tampering with a Witness. The State recognizes that in its initial prosecution, "domestic violence" was not referenced in the charging information. CP 17. This amounts to a scrivener's error, which is evident based upon the jury special verdict finding. CP 50. Upon remand, the State will address the Appellant's issue with domestic violence not being pled and proven by including the proper statutory references in an amended charging information. Based upon that, if this Court follows the State's rationale, the Appellant's six convictions for Violation of a Domestic Violence No-Contact Order and Assault in the Fourth Degree Domestic Violence will properly be included in his offender score.

V. CONCLUSION

As stated above, in regards to the Appellant's conviction for Tampering with a Witness, the State agrees with the Appellant. The

conviction should be reversed and remanded for a new trial. In regards to the convictions for Violation of a Domestic Violence No-Contact Order, the Appellant's argument is without merit. Upon conviction of a felony domestic violence offense, a trial court can include these domestic violence convictions in an offender score.

Respectfully submitted this 19th day of December, 2013.

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I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on December 9th, 2013.

Michelle Sasser

Michelle Sasser

COWLITZ COUNTY PROSECUTOR

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